Denver Law Review

Volume 24 | Issue 9 Article 5

1947

Vol. 24, no. 9: Full Issue

Dicta Editorial Board

DICTA

VOLUME 24

1947

The Denver Bar Association
The Colorado Bar Association
1947

FOREWORD

This volume is an exact photo-reproduction of an original copy of

DICTA

(Denver Bar Association)

Volume 24

1947

This reprint is offered to enable Law Libraries to complete their collection of legal periodicals.

The reproduction follows the original in every detail, and no attempt was made to correct errors and defects in typography.

Buffalo, N. Y.
February, 1959

DENNIS & CO., INC.

Printed in U. S. A.

THE BRADFORD-ROBINSON PRINTING CO.

Denver, Colorado

DICTA

Vol. XXIV SEPTEMBER, 1947 No. 9

Calendar

Sept. 22-26—American Bar Association annual meeting, Cleveland, Ohio.

Oct. 6—Denver Bar Association, regular monthly meeting, 12:15 P. M., Chamber of Commerce dining room.

Oct. 16—District Judges' Association annual meeting, County Judges' Association meeting, District Attorneys' Association meeting, Board of Governors meeting, Broadmoor Hotel, Colorado Springs.

Oct. 17-18—Colorado Bar Association annual meeting, Broadmoor Hotel, Colorado Springs.

49th Annual Meeting of the Colorado Bar Association

BROADMOOR HOTEL, COLORADO SPRINGS

PROGRAM

Thursday, October 16, 1947

10:00 a.m. District Judges Association—Conference—Judge Claude C. Coffin, Ft. Collins, President, presiding.

10:00 a.m. County Judges Association—Judge Christian D. Stoner of Golden, President, presiding.
Meeting called to order.
Round table discussion—"Why Bills Sponsored by County Judges Failed."
Open discussion of problems of the county judge.

2:00 p.m. Peter Holme, Jr., will discuss the findings of the Judiciary committee.
Open discussion of judges regarding Colorado judicial system and committee's recommendations.

2:00 p.m. Board of Governors—Fifth Floor Suite.

Friday, October 17, 1947

10:00 a.m. Probate, Real Estate and Trust Law Section—Little Theatre.
Albert S. Isbill of Denver, Chairman, presiding.
Joint meeting with committee on Real Estate Standards—Edwin J. Wittleshofer of Denver, Chairman. This meeting is open to all members of the association and the county judges.
Percy S. Morris—"Foreign Wills and the 1947 Amendments with Reference Thereto."
Pierpont Fuller—"1947 Amendments in General and Necessary Changes and Procedure."
Edwin J. Wittleshofer—"Real Estate Title Standards."

10:00 a.m. Water Section—Ballroom.
Malcolm Lindsey of Denver, Chairman, presiding.
"Conference on Current Water Rights Problems."

10:00 a.m. District Attorneys Association—Palm Court.
Irl Foard of Colorado Springs, President, presiding.

10:00 a.m. Junior Bar Section—Golf Club.
Wilbur E. Rocchio of Denver, President, presiding. General business meeting and election of officers.

10:30 a.m. Board of Governors—Fifth Floor Suite.
Milton J. Keegan of Denver, President, presiding.

12:00 p.m. Entire association Luncheon—Dining Room.
Leonard H. Haynie of Alamosa, Vice President, presiding.
The Law Club of Denver will present "Trial by Jury" by Gilbert and Sullivan. Wm. Hedges Robinson, Jr., President; Charles J. Beise, Program Chairman.

2:00 p.m. General Open Meeting—Auspices of Junior Bar Section.
Leonard H. Haynie of Alamosa, Vice President, presiding.
Wilbur E. Rocchio of Denver, Chairman.
"Economic and Industrial Development of Colorado and Rocky Mountain Empire"—Robert L. Stearns; John L. Morach, United Steel Workers, C. I. O.; Dr. Frederick Rohrman, Department of Research, University of Colorado.

3:00 p.m. to 5:00 p.m. Tea for the ladies in attendance. Hostesses are Mrs. Thomas M. Burgess and Mrs. Merril E. Shoup—at home of Mrs. Shoup, 17 Broadmoor Avenue, Broadmoor.

8:00 p.m. Ice Show—Broadmoor Ice Palace.
Auspices of El Paso Bar Association.

9:30 p.m. Dancing—Ballroom.

Saturday, October 18, 1947

10:00 a.m. General Open Meeting—Little Theatre.
Auspices Committee on Judicial Administration—Philip S. Van Cise of Denver, Chairman; Stanley H. Johnson of Denver, Executive Secretary.

12:00 p.m. Entire Association Luncheon—Dining Room.
James K. Groves of Grand Junction, Senior Vice President, presiding.
Speaker: Will Shafroth of Washington, D. C.
Subject: "Modern Aids in Court Administration."
Mr. Shafroth is chief of the Division of Procedural Studies and Statistics, Administration Office of the United States Courts.

2:00 p.m. General Session—Little Theatre.
Erskine R. Myer of Denver, Vice President, presiding.
Milton J. Keegan: President's Address.
Report of Judiciary Committee.
Report of Nominating Committee.
Unfinished Business.
New Business.
Special Orders.
Election of Officers.
Adjournment.

6:00 p.m. Cocktail Party—Mezzanine.
Compliments of the Broadmoor Hotel.

7:00 p.m. Annual Banquet—Ballroom—Informal.
Milton J. Keegan of Denver, President, presiding.
Presentation of guests and new officers of association.
Speaker: Hon. John J. Parker of Charlotte, North Carolina. Judge Parker, who is Senior United States Circuit Judge of the Fourth Circuit, served as America's alternate member on the International Military Tribunal which sat at the Nuremburg Trials. In 1943 he was awarded the gold medal of the American Bar Association for conspicuous service in the cause of American jurisprudence.

9:30 p.m. Dancing—Ballroom.

Hotel Accommodations

Broadmoor Hotel, Colorado Springs, convention hotel. Overflow will be accommodated at other hotels in the city. Rates for this meeting will be: regular rooms, $4.00 per person (double—no singles available); lanai suite, $7.00 per person, double; $3.50 per third person. All reservations should be addressed to manager, Broadmoor Hotel, Colorado Springs.

Newly Admitted Members of the Bar

MISS ONALEE BROWN, A.B. Western State 1944, LL.B. Colo. U. 1946, admitted Mar. 3, 1947 as result of Dec. 1946 exam. Member Delta Sigma Epsilon, Pi Kappa Delta. Interested in real property law. Associated with F. W. Harding, 624 E. & C. Bldg., Denver. (Editor's note: Our nominee for "Miss Denver Bar of 1947".)

THOMAS E. MCCARTHY, A.B. Fordham 1940, LL.B Colo. U. 1947, admitted Mar. 24, 1947 as result of Dec. 1946 exam. Was in army service for three years. As tail gunner with Eighth Air Force, flew 33 mission in European theatre. Now assistant city attorney assigned to the Municipal Court, Denver. JOHN H. WINCHELL, Colorado School of Mines, 1917, E.M., E.Met.; Westminster Law School, 1946, LL.B.; admitted Mar. 3, 1947, as result of Dec. 1946 exam. Member Sigma Nu and Theta Tau. Resigned as clerk of the district court, Denver, Sept. 1, to enter private practice at 205 Majestic Bldg., Denver. Was clerk of the district court for five years. Was formerly in insurance business (C. L. U.), and is now county chairman of the Republican Party. Will engage in general practice.

MUNRO L. LYETH, Harvard, B.A. 1937, LL.B. 1940, admitted Mar. 10, 1947, as result of Dec. 1946 exam. Was admitted to New York bar in 1941. Practiced law in New York City until called to navy duty in 1941. Separated from navy in 1946 with rank of lt. com. Now assistant trust officer, United States National Bank, Denver.

Admitted to a Higher Court

FRANK C. MYERS, well known attorney, died Aug. 19 at the age of 63, from cerebral hemorrhage. Mr. Myers was born in Sharonville, Ohio, attended night law school in Cincinnati, and came to Denver in 1905. He was graduated from Denver University law school in 1909. He was active in several Masonic organizations.

New Professorship at Colorado University

Announcement has been made of the receipt by the law school of the University of Colorado of a gift of $107,800 for the establishment of a guest professorship. Olivia Thomson bequeathed $75,000 in memory of her husband, Charles Inglis Thomson, the accumulations have brought the fund to the present figure. Each year an outstanding American or world authority in selected fields of law will be invited to lecture on major subjects including international and comparative law. Judge Thomson, who died in 1907, was a well known and successful lawyer in the earlier days of statehood of Colorado. He was twice presiding judge of the Colorado Court of Appeals.

Use of Summary Judgments and the Discovery Procedure

By MAX MELVILLE

Of the Denver Bar. An address delivered before the Annual Conference of the Tenth Judicial Circuit at Denver, June 14, 1947.

A short ten years ago it was the God-given right of every lawyer to come into court armed with concealed facts to subdue his opponent. Today, the opponent who allows such a thing to be done to him should have his head examined.

It was supposed to be the inalienable privilege of insurance and public carrier investigators to secrete from inspection the witness statements they had garnered by arriving on the scene of the catastrophe so quickly as almost to be a part of the *res gestae*. That is a thing of the past.

Less than a decade ago it was considered the constitutional right of every debtor served with a complaint demanding payment of an account, accompanied by an exhibit itemizing such account, to wait until the very last minute on the last day and then file a motion to force plaintiff to specify as to each item the time of day at which it was allegedly delivered.

Hand in hand with this was a motion to strike the allegation that defendant owed plaintiff on the ground that it stated a conclusion of the pleader and not an ultimate fact.

After plaintiff had furnished the bill of particulars showing the time of day, and after the court had struck out the conclusion, a demurrer for failure to state a cause of action made the plaintiff wish he had never been born.

Then when the happy day arrived that double-talk in the fifth amended complaint convinced the court that a cause of action was stated, defendant filed a general denial, completely ignoring the itemized exhibit. By this time the jury term had expired and plaintiff was stymied until at a subsequent term a jury would decide what no one connected with the case had ever doubted, namely, that defendant owed plaintiff.

But the Supreme Court fell victim to seduction and on a bleak day in 1938 emitted two instruments of torture which were to rob all defendants and all lawyers of the age-old rights I have described. These instruments were the discovery procedure and the summary judgment.

The discovery procedure, when intelligently employed, makes it certain that all litigants will come into court clad only in genuine issues of material fact. If a defendant cannot muster a genuine issue of fact, but appears in court naked, he is fair prey for the summary judgment, and the time of courts, jurors and litigants is saved. Such was the idea of the Supreme Court in establishing the Rules of Civil Procedure, and slowly but surely the idea

has attained fruition, especially since the amendments to the rules, which become effective this fall, have made the court's views strikingly clear.

I do not mean to say that recognition of the true spirit of the rules was instantaneous with the courts. Some of them have palpably thought it would be reversible error to deny a motion for a bill of particulars even though, as has happened to me, they must force defendant to give access to his books so that plaintiff can extract the necessary information from them and, to comply with the court's order, turn around and give it back to the defendant. It was an upside-down-and-backward procedure smacking of Alice in Wonderland.

It seems only yesterday I was compelled to furnish a bill of particulars (the information from which could be obtained only from defendant's own records) which resulted in a 10-part description of each of 42,000 claimed overcharges, the precise nature of which had been specified in the complaint. When that 1,400-page bill of particulars became, as rule 12 jocularly insisted it must, an integral and necessarily answerable part of the complaint, it certainly was rape by force of the chaste provision of rule 8 that the complaint shall be a "short and plain statement of the claim showing that the pleader is entitled to relief," besides flaunting Judge Bratton's ukase in *Porter v. Karavas,* 157 F. (2d) 984, that the purpose of rule 8, "is to eliminate prolixity in pleading and to achieve brevity, simplicity and clarity."

Defendant having spawned this 420,000-headed Hydra, but finding itself faced with the necessity of arguing with each separate head, grew haughty and disinherited its handiwork by filing a bitter general denial to the composite monster. The matter ended in a summary judgment.

Fortunately, the amended rule will eliminate the troublesome term "bill of particulars," and, as was always intended to be the case, will confine the scope of motions to make definite and certain to pleadings which are so vague and uncertain that an adversary cannot with any safety file a responsive pleading. The sole purpose in granting such motions should be to insure the casting of a pleading so that the adversary may be fairly apprised of the issues he must meet, and so that a basis will be provided for a binding, comprehensive judgment settling the controversy and claimable as *res judicata.* No longer must such motions serve, as some courts have permitted them to serve, as cumbersome and irksome substitutes for discovery of evidence and as instruments of delay.

There is nothing novel in the summary judgment procedure. It has been the law of England for more than half a century. Thirty years ago I had a professor who foresaw and predicted the coming of what we have today. He had visited England and had made a study of the English procedure.

"Believe it or not," he used to say, "over there when a suit is brought on an account, the creditor simply indorses on the summons the amount claimed. Defendant is then in for the fight of his life. He has no vested right to answer.

He must first convince the court by a sworn statement that he probably has a meritorious defense—much like our practice in attempting to set aside a default judgment. Unless he can so convince the court, judgment is summarily rendered against him."

That practice, somewhat modified but with an added right in the court summarily to dispose of questions of law at the same time, is our present summary judgment procedure.

My professor who predicted all this was the one who set in motion the forces which have resulted in the rules. It was he who, as early as 1922, suggested that the Supreme Court write rules uniting the common law and equity principles of procedure so as to secure one form of civil action. He had been a federal circuit judge, and was sometime president, and presently to be chief justice, of the United States. He was William Howard Taft.

Ten years ago the most vitriolic accusation that could be made against an adversary seeking pre-trial information was that he was conducting a "fishing expedition." It was a far worse taunt than the ancestral doubt. It evoked black looks from the bench and hints of commitment of the scalawag fisherman for contempt. In the *American Tobacco Company* case (264 U. S. 298) the Supreme Court uncompromisingly denounced "fishing expeditions" as "contrary to first principles of justice."

Even in 1940, after the rules were in effect, a Pennsylvania federal judge fulminated:

> "To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation." *Lewis v. United Air Lines Corp.*, 32 F. Supp. 21, 23.

Today there can be no doubt of a party's right to do just that thing. No privilege attaches to the investigations and opinions of the other side's experts.

It is interesting to note the reversal of form as to fishing expeditions. In *Hickman v. Taylor*, 67 S. Ct. 385, 392, the Supreme Court this year said:

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

The Supreme Court recently rejected an amendment proposed by its advisory committee on the rules (the only proposed amendment, I think, rejected by the court) which practically throttled the disclosure of writings obtained or prepared by the adverse party, his attorney, surety, indemnitor,

or agent in anticipation of litigation or in preparation for trial, and absolutely garroted the right to disclosure of the opinions of an expert, as well as the mental impressions, conclusions, legal theories or opinions of an attorney.

That rejection obviously was because of the conviction of the court, as evidenced by the *Hickman* case, that a litigant has no right to withhold from his opponent any "information" whatever that he may possess relevant to the case at hand, whether acquired by his own efforts or those of others, including his agents and insurers.

The search for truth, not jockeying for position at the rail, now controls.

Summary Judgments

Summary judgments are governed by rule 56. A party who asserts, or against whom is asserted, a claim for relief, may move for summary judgment. As the rule now is, the plaintiff may not make such a motion until after the answer has been filed, but under the amended rule he will be able to do so 20 days after commencement of the action, or at any time after service of a like motion by defendant.

The gravamen of the rule, as it will be, is:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The wording of the old rule as to an issue of damages was changed so as to remove a doubt cast by the Supreme Court in *Sartor v. Arkansas Co.*, 321 U. S. 620, from which some drew an inference that there could be no summary judgment where the amount of damages was in issue. The amendment makes it clear that the issues as to amount of damages need not interfere with the operation of the rule as to the remainder of the case.

It has been said that the benefits of a summary judgment are: (1) it discourages the defense which is interposed only for delay; (2) it gives plaintiff a speedy judgment in the average commercial case, and (3) it encourages creditors to resort to courts, knowing they will get rapid satisfaction.

But there is another important factor: it permits a speedy determination of issues of law, *bona fide* or otherwise, as well as of sham defenses. In other words, when adroit use of the discovery procedure demonstrates that no genuine issues of material fact actually exist, but questions of law remain which under former procedure would have to await determination of the

supposed, but actually non-existent, issues of fact, those issues of law may be disposed of summarily and the entire case buttoned up without further ado.

It was this last factor which we found so helpful in OPA (if I may be forgiven for dragging that rowdy corpse into this discussion). We found that approximately 70 per cent of our damage cases could be won in that way.

It became our practice in damage cases based on overceiling sales to attach to the complaint an exhibit which was an abstract and summation of figures taken by our accountants from defendant's own records, and showing the violative sales and the amount of overcharges.

This exhibit was incorporated by reference into our allegation as to overceiling sales. In short, our complete case, made from defendant's own records, was laid on the table by our complaint.

True, the defendant could set up that his records were incorrect, but he was put eye to eye with the damaging admissions those records contained.

The answer—when at long last it arrived—almost invariably set up as a first defense a general denial, completely ignoring the itemized exhibit and not bothering to deny specifically the authenticity or accuracy of the figures therein.

Then, invariably, came a series of separate affirmative defenses: (1) the Emergency Price Control Act was unconstitutional; (2) the price regulation was unconstitutional; (3) the regulation violated the act because it made changes in business practices of defendant, a thing which the act specifically forbid; (4) the administrator was estopped because one of his employees had verbally informed defendant that his prices or acts were legal; (5) the defendant had acted in utmost good faith in reliance on such oral advice, and (6) defendant was unable to make a profit if forced to sell at the legal prices and, therefore, his property was being taken without due process of law.

Now, all these separate defenses would present only issues of law. It was such a situation which led to the case of *Schreffler v. Bowles,* 10 Cir., 153 F. (2d) 1, the opinion in which was written by Judge Huxman. The case is considered as a leading one on the question of summary judgments.

I wish I could claim personal credit for winning that case, but I cannot. It must go to Mr. Henry Lutz, one of the bright, shining stars on our legal staff.

The complaint was one for damages for overceiling sales of steel products, and a summary of the illegal transactions, prepared by our accountants, was attached as an exhibit to the complaint.

The first defense in the answer was a general denial, and seven other defenses presented issues of law. A motion for summary judgment was filed. Attached were the affidavits of two accountants that they had prepared the exhibit from defendant's own records, and that the exhibit correctly reflected what those records showed. Judge Symes granted the motion for summary

judgment for the amount of overcharges shown in the exhibit and claimed as damages in the complaint.

In the opinion affirming this judgment, Judge Huxman pointed out that the correctness and authenticity of the figures shown in the exhibit "were not specifically denied or disputed by defendants' answer." No affidavits, he said, were filed "challenging the verified statements of the two accountants who prepared the schedules. In the condition of the record, a mere general denial in the answer of the allegations of the complaint was insufficient to place in issue the correctness of the schedules in exhibit A and the court was correct in entering summary judgment unless one of the affirmative defenses tenderd a substantial issue which would preclude the entry of such a judgment." The opinion then proceeds to dispose of the remaining seven defenses as being insufficient in law.

It will be observed that while the itemized exhibit and the affidavits of the accountants were not conclusive proof of the claimed overcharges, yet they constituted such proof of damaging admissions contained in defendants' own records as to make mandatory, on motion for summary judgment, a denial of their accuracy.

But it does not follow from the *Schreffler* case that a seaworthy summary judgment may be obtained in every case where the trial court is convinced that no genuine issue of material facts remains to be tried. This is exemplified by another decision of the Circuit Court of Appeals for the 10th Circuit in *Avrick v. Rockmont Envelope Co.*, 155 F. (2d) 568, the opinion in which was written by Judge Murrah.

Yesterday, you heard Judge Murrah grant a general amnesty for all critical remarks that might be made here about judges and courts. Being essentially cautious, however, I obtained from him a specific immunity for the foolhardy remarks I am about to make. The judge qualified his grant, however, as do radio stations broadcasting controversial talks, by saying that my remarks must not be construed as necessarily reflecting his own views. You will see that they do not.

To me, the *Avrick* decision is curiously interesting, for I defy anyone to read the first 16 paragraphs of the 18-paragraph opinion and conclude otherwise than that the sumary judgment is to be affirmed. The denouement in the final paragraphs is breathtaking.

> 1. I think it cannot be reconciled with the broad view taken in the Schreffler case, in which Judge Murrah concurred, that it is incumbent upon an adversary to come forth with his justifying material against vital material statements made in the papers comprising the summary judgment motion.
>
> 2. I think it is out of line with the Supreme Court case of *Griffin v. Griffin*, 327 U. S. 220, where it was impliedly held that one charg-

ing fraud against the moving party must do more than simply make the flat charge—must fortify his allegation by tangible supporting statements. In the Griffin case, the party did attempt to do this, but the court, on examination, found as to the supporting assertions, "that the only support for them, so far as appears, is petitioner's unsupported suspicions."

3. It follows a highly controversial, rough-and-tumble decision of Judge Frank in the Second Circuit which even he, in a subsequent case, could not follow unaided to the conclusion reached in the Avrick case. This subsequent case held, as does the Avrick case, that one charging fraudulent intent or conduct need not, in resisting summary judgment, present the facts constituting the basis of his charge; that he is entitled to lie back and gamble on what happens at the trial. But to accomplish that result, Judge Frank had to set aside a fact-finding of the trial court—a thing which the Avrick decision hints at, but does not quite do.

I do not wish to be understood as saying for a moment that a genuine issue of substantial fact may be decided on affidavits in a summary judgment proceeding. My point is that a party should not be permitted with impunity to charge fraud in glittering and sweeping generalities—particularly, on information and belief—and then not be required to come forth with something tangible enough to give rise to a reasonable assumption that a genuine issue of material fact is present in the case. Rule 9(b) itself provides that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

The second Tenth Circuit case to which I have referred, *Avrick v. Rockmont Envelope Company*, was a trade-mark infringement suit in which only an injunction was sought, and in which, therefore, the court was the trier of the facts. The complaint alleged, on information and belief, that defendant's claimed imitation of plaintiff's product was deliberately and intentionally designed to create confusion and mistake in the public mind and to deceive purchasers—in short, that defendant had acted with fraudulent intent. Defendant's motion for summary judgment was granted by Judge Symes.

Judge Murrah, in reversing the judgment, held that:

1. Although from the deposition and affidavits on file there was no competent evidence that an ordinary, duly careful purchaser would have been deceived, and

2. That although the trial court compared specimens of the two products, looking at them, as Judge Murrah said, "through the eyes and with the mind of an ordinary purchaser exercising due care and caution," and concluded, as a fact, that the ordinary purchaser would not be deceived, nevertheless,

3. The case must be tried.

The reason assigned was that since the complaint alleged intent to infringe, and since such an intent is sufficient in law to justify an inference of confusing similarity, the court should have considered the matter.

To me, it would seem that the question of intent had no place in the case unless the judge was in doubt as to the likelihood of deception. If he was, then a finding of intent might well tip the scales. But if there were no confusing similarity in fact, intent would not enter into the question.

Evidently, however, the trier of facts, Judge Symes, had no such doubt, and since he was the exclusive judge of the effect on the mind of the ordinary careful purchaser, his certainty that deception did not exist would seem to end the matter.

The case cited by Judge Murrah supporting his statement that the courts must use their summary judgment power cautiously is *Doehler Metal Co. v. United States,* 2 Cir., 149 F. (2d) 130, the opinion in which was written by Judge Frank and which is the highly controversial case I referred to a moment ago. I shall discuss it more fully in a moment, for it was the opening gun in the conflict between two diametrically opposite philosophies as to summary judgments in the Second Circuit.

It was followed by Judge Frank in the opinion he wrote in a subsequent case, *Arnstein v. Porter,* 154 F. (2d) 464, but there he recognizes the validity of the point I am attempting to make here. It was a musical copyright infringement case in which the trial court, finding there was insufficient similarity between the copyrighted music and the allegedly infringing music to warrant a judgment of infringement, granted a summary judgment, although plaintiff had charged in his complaint that defendant had had access to his copyrighted work.

Access in that type of case, like intent in the *Avrick* case, would justify an inference of similarity. The plaintiff, in opposing the motion for summary judgment, offered nothing but conjecture in support of his claim of access, just as in the *Avrick* case plaintiff offered nothing in support of his claim of illegal intent.

In *Griffin v. Griffin,* 327 U. S. 220, which I have previously referred to, the Supreme Court clearly implied that it was the duty of one claiming fraud to support such claim in resisting a motion for summary judgment, and held that bolstering by suspicions was not enough to meet that duty.

Returning now to the *Arnstein* case, Judge Frank specifically recognized that where there was insufficient evidence of similarity to warrant a finding of infringement, the question of "access" was immaterial. He avoided the impact of that rule, however, by listening to a playing of the two compositions and overruling the finding of the trial court on the issue of similarity.

He then reversed the judgment on the ground that the compositions in

fact being similar, the plaintiff was entitled to a hearing on the matter of access.

Accordingly, we have a situation where an appellate court substitutes its own judgment for that of the trial court on what should be the completely dispositive issue of fact, properly determined on the hearing of a motion for summary judgment, when, had the trial court proceeded to hear all the evidence and then make the same fact-ruling as to similarity, such ruling probably would have been binding on the appellate court.

Frankly, I think that is just what occurred in the *Avrick* case. While Judge Murrah says, "While from a comparison of the two specimens side by side we think there is little likelihood that the ordinary purchaser while exercising due care and caution would be misled and deceived," nevertheless, what impliedly was said to the trial court was, "We are inclined to think you might be mistaken in finding that there was no likelihood of deception. You should start all over again, this time with an incipient doubt in your mind. Then to settle this doubt, you must mix in thoroughly the ingredient of intent. By that process you may well arrive at a different result."

I appreciate, of course, that it has frequently been ruled that an appellate court, especially on the equity side, can overrule the decision of the trial court on issues of fact where, for example, such issues are presented by documents, and the like. I am entirely willing to concede that within that rule come listening to the playing of music for comparison purposes, or visually comparing specimens in a trade-mark infringement case.

But if that rule is brought into play, then, I submit, the appellate court should make a fact-finding that sufficient similarity exists to make mandatory a consideration of access or intent, as the case may be.

The *Doehler* case, approvingly cited by Judge Murrah, is intriguing because it presents a conflict of opinion, not, mind you, between or among circuits, but an intra-circuit conflict, so to speak. Judge Frank wrote the opinion for a bench consisting of himself and Judges Learned Hand and Chase. In reversing a summary judgment, he says that a case decided three months earlier in the same court, but by a bench in which he had but a dissenting voice, "will be respected as a precedent," "but the judges sitting in the instant case think that that ruling, because of the peculiar atypical facts" of the case "should not be generously applied."

The case referred to was *Madeirense v. Stullman-Emerick Co.*, 147 F (2d) 399. It had received the blessing, if a denial of certiorari can be considered a blessing, of the Supreme Court. As far as I can judge, the only "atypical" fact present in the case was that the majority opinion did not square with Judge Frank's philosophy. He filed a vigorous dissenting opinion. The majority opinion was written by Judge Clark, who from the beginning has been a member of the Advisory Committee on the Rules for the Supreme Court, speaking for himself and Judge Swan.

(I may say parenthetically that Judge Clark evened up in the *Arnstein* case by also filing a vigorous dissent in which he referred to Judge Frank's opinion in the *Doehler* case as "a novel method of amending rules of procedure," and added, "Worse still, it is *ad hoc* legislation, dangerous in the particular case where first applied and disturbing to the general procedure.")

Judge Frank's dissent in the *Madeirense* case said the other judges were wrong in holding it to be the duty of the defendant to file an affidavit in contesting the summary judgment motion to explain away previous damaging admissions as to the market price which governed the measure of damages. He said:

> "In other words, to induce discovery, my colleagues are using a harsh rule on a motion for summary judgment. I think such a device is improper. I favor liberal rules for discovery. But since it can be had directly—by examination before trial, answers to interrogatories, and the like—I see no reason for springing on the seller here an indirect method, no excuse for employing a threat of summary judgment as a sort of rack or thumb-screw to bring about disclosure of evidence. I think the majority opinion is unfair to the seller and creates an unfortunate precedent improperly magnifying the power of a trial judge."

So, we have from Judge Frank a philosophy that no matter how many damaging admissions a party may have made, and even though they are set forth by his adversary in the summary judgment papers, he is under no obligation to controvert them in that proceeding.

Our *Schreffler* case, in which the Supreme Court denied certiorari, held exactly the other way. The *Avrick* decision, however, appears to follow Judge Frank's theory, and to that extent is inconsistent with the *Schreffler* case.

The philosophies which are now gutter-fighting in the Second Circuit may be epitomized thus:

Judge Frank's school insists that although a motion for summary judgment is supported by, say, plaintiff's affidavit on the vital, dispositive issue, and the adversary does not see fit to—or perhaps dare not—controvert it under oath, nevertheless the entire case must go to the jury to see whether it believes the plaintiff on the witness stand. In short, an adversary must not be put under compulsion to deny what his opponent has stated under oath, because, perhaps, by vigorous cross-examination the jury may conclude that the affiant is not worthy of belief. That was one of the reasons assigned by Judge Frank in the *Arnstein* case.

Judge Clark's school, on the other hand, feels that when a vital, dispositive matter is put in issue by affidavit, the adversary is under a duty to deny or explain under oath, or suffer the consequences.

Lawyers in the Second Circuit are in a peculiar position. If their cases are heard before a bench consisting of Judge Frank and either Judge Hand

or Judge Chase, the law of summary judgments is one thing. On the other hand, if Judges Clark and Swan comprise the majority, the law is quite another thing altogether.

But they are in no greater dilemma than I am when I try to tell you what the law on the subject is in the Tenth Circuit.

At all events, the summary judgment motion, though not granted in full, requires the court to narrow the case to the actual issues it considers exist.

Rule 12(b), relating to dismissal for failure to state a claim, and 12(e), relating to motion for judgment on the pleadings, have been amended so as to permit, but not require, the trial court to allow matters outside the pleadings to be shown and considered, and to treat the matter as one for summary judgment, allowing the parties all of the mechanics of the summary judgment rule.

Discovery

Setting the stage for a summary judgement may not be so easy as it was in our *Schreffler* case. It may be necessary to pry certain information from your adversary and to obtain certain admissions, or to get a look at certain documents or records in his possession or control, or in the possession or control of persons not parties to the case.

It may be that you will need some clues to run down with a view to developing competent, admissible evidence. Here is where the discovery procedure comes into play.

The Supreme Court made it abundantly clear in *Hickman v. Taylor*, 67 S. Ct. 385, that a party has no vested right to withhold from his adversary any relevant facts in his possession, whether obtained by him or his agents, attorneys, insurers, or indemnitors in anticipation of litigation or in preparation for trial. (See *De Bruce v. Pennsylvania R. Co.*, D. C. Pa., 6 F. R. D. 385.)

The court made it clear that in the ideal situation the parties would come into court without a concealed fact between them. "No longer," it said, "Can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."

In discussing discovery procedure, I shall also speak of the amendments which go into effect this fall.

Discovery procedure serves four purposes:

1. Elimination before trial of all matters that on the face of the pleadings appear to present issues of fact, but concerning which there is, or at least should be, no controversy.

2. To develop evidence admissible at the trial.

3. To ferret out information which may lead to the development of evidence usable at the trial. It is unnecessary that the information sought itself be competent and material, if it is relevant.

4. To pry out everything possible as to the adversary's claim or defense.

There has been considerable conflict in judicial decisions as to whether the scope of examination under depositions, interrogatories and inspection of documents and places and things is confined to matters which are *per se* competent, material, admissible evidence. Gradually, however, the weight of authority came to be that the sole test to apply is "relevancy," assuming that the matter inquired into is not privileged under some rule of testimonial exclusion such as the attorney-client privilege or the privilege against self-crimination.

Such authority held that it was no valid objection that the matter inquired into called for hearsay as long as it might reasonably constitute clues to evidence which would be admissible.

This point has been definitely settled by the amendments to the rules. To rule 26(b), relating to depositions, has been added this provision: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Rule 33, relating to interrogatories, has been amended to provide that they may relate to any matters which can be inquired into under rule 26(b), and rule 34, relating to discovery and production of documents, will provide that any documents, papers, books, accounts, letters, photographs, objects, or tangible things may be called for "which constitute or contain evidence relating to any of the matters which are within the scope of the examination permitted by rule 26(b)," and which are in the adverse party's possession, custody, *or control.*

Rule 30(b), relating to depositions on oral examination, provides for the protection of parties and deponents against unreasonable practices, and this protection is extended to interrogatories under rule 33.

Let me emphasize strongly once again that the evidentiary rules as to competency and materiality have no application in the taking of depositions, the scope of interrogatories, or the production and inspection of documents and other things or the access to places.

"Relevant," as used in the rules, does not mean "material and competent under the rules of evidence." *Engl v. Aetna L. Ins. Co.*, 2 Cir., 139 F. (2d) 469.

Relevancy, as I have said, is the sole test as to non-privileged matters.

The Instruments of Discovery

The four principal weapons of discovery are: (1) depositions, (2) interrogatories, (3) production of documents and inspection of places, and (4) requests for admissions.

Under the rules as they now stand, speed in the employment of the weapons of discovery has been hampered by the rules themselves in the case

of depositions and requests for admissions, and by judicial fiat in the case of interrogatories and of production and inspection, because none of them could be used as of right until after answer had been filed.

Bills of particulars and other dilatory tactics were manna from Heaven for defendants and instruments of torture to plaintiffs, especially in view of the manifest reluctance of the courts to permit use of the weapons until the case was at issue.

Many judges took the position that if a plaintiff did not have his case completely proof-worthy before he commenced it, he was entitled to no more consideration than the rules gave him as a matter of right after the case was at issue.

Under the amended rules, however, everything is reckoned from the date of commencement of the action. A party will have an absolute right to take depositions 20 days, and serve interrogatories and requests for admissions 10 days, from such date of commencement. As I have stated before, he may file a motion for summary judgment 20 days after commencement of the action, or at any time after his adversary has filed such a motion.

Depositions

Depositions may be taken on either oral or written interrogatories. They are by far the most valuable, although the most expensive, discovery weapon for four reasons:

1. Unlike interrogatories and requests for admission, which are available only against parties to the action, the deposition of any person, party or not, may be taken.

2. Depositions permit a flexible and searching examination (cross-examination in case of adverse parties), shifting as the exigencies of the course of examination demand.

3. Subpoenas *duces tecum* may be put to valuable use in connection with them. This use is particularly valuable because rule 34, under which production of documents, papers, and the like may be obtained, is limited to parties, while the use of subpoenas *duces tecum* with depositions is not.

4. Subpoenas *duces tecum,* under the amended rule, will be obtainable without order of court, while production under rule 34 is not. This will change the burden of showing cause for obtaining the desired papers, which at present is on the one desiring them, to a burden on the adverse party of showing cause why such papers should not be used.

The scope of inquiry on deposition is as broad as is imaginable. The examination may touch upon any matter, not privileged, which is "relevant" to the claim or defense of the examining party *or* the claim or defense of any other party. Thus it is not restricted to matter as to which the examining party has the burden of proof, but may probe the adversary's defenses or claims.

Depositions may be used either for the purpose of discovery, or for evidence, or for both purposes.

The examiner may inquire into "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things."

Inquiry may also be made as to "the identity and location of persons having knowledge of relevant facts."

Obviously, much of the matter developed may be hearsay or immaterial, but, as I have said, that is no valid objection if the testimony sought is reasonably calculated to lead to the discovery of admissible evidence.

Again, it is not ground for objection that the examining party himself has personal knowledge of the facts he is attempting to extract from the witness. Knowledge is not, of course, necessarily proof, and the examiner may wish to find out how and where to develop his proof. Moreover, he will wish to know to what extent his adversary will admit certain facts.

The mere *taking* of a deposition does not make the deponent the examining party's witness. But unless the deponent is an adverse party, or an officer, director, or managing agent of a public or private corporation or partnership or association which is an adverse party, or unless it is done solely for the purpose of contradicting or impeaching the deponent, the introduction in evidence of all or any part of a deposition serves to constitute the deponent the witness of the party offering the deposition.

Something that should be remembered in connection with the use of depositions is that they are subject to the provisions of rule 43(b) that an adverse party, or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, may be called and be interrogated by leading questions and contradicted and impeached in all respects as if he had been called by the adverse party. In short, he may be cross-examined with impunity.

Confusion still exists as to this, due no doubt to the difference between the old practice on the law and equity sides of the court. In equity that right did not exist, and the examiner was bound by the testimony of the witness. At law it depended upon the state practice. In the Colorado state courts an adverse party could be called for cross-examination by virtue of a statute, and the procedure on the law side of the federal court, of course, followed that practice.

We were told by one of the federal judges in Montana that he did not believe in rule 43(b) and would not enforce it in his court. We never got the opportunity to change his mind.

Interrogatories

Interrogatories are governed by rule 33. They may, under the amended rule, cover any matter that may be covered or touched upon by deposition, but they are usable only against parties to the action.

They are not so satisfactory as depositions for another reason, however, because since they are served in written form, the adverse party has ample time to prepare cautious and exact answers and seek and take advice without the hazard of piercing cross-examination. Hence, evasion cannot be dealt with readily. However, if the answers are unsatisfactory, they may be followed by deposition, and this may lead to the impeachment of the witness through contradictions developed between studied answers and harried answers.

Interrogatories may follow depositions, or *vice versa.* Under the amended rule, the number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.

Under the amended rule, for the first time answers to interrogatories may be used in evidence to the same extent and under the same limitations as may depositions under rule 26(d).

Extended also is the requirement as to who may be called upon to answer the interrogatories in case the adverse party is a public or private corporation or partnership or association. Formerly, it was only an officer. Under the amended rule, it may be an agent (and that is not limited to managing agent), and it is further provided that either the officer or the agent "shall furnish such information as is available to the party." This settles a long-standing contention that the officer need give only information specifically known to him.

Requests For Admission

The request for admission is a valuable weapon because you can state the crux of your own or your adversary's claim or defense in the form of requiring him to admit or deny under oath, or state under oath why he cannot truthfully admit or deny, the material things you believe to be true or untrue.

The significant thing about the working of this rule is that under any other practice it required affirmative action on the part of the questioned person to constitute an admission, while under this rule affirmative action on his part to deny, or to explain why he cannot truthfully admit or deny it, is imperative to prevent admission from being automatically and forcibly and conclusively taken against him because of his very failure to deny or explain. If he does not answer, or if his answers are insufficient to meet the request, the requested facts are conclusively deemed to be true.

Remember that it is mandatory, in answering requests for admission, that your denial or your explanation must be verified.

Under the amended rule, no longer may the adverse party file an objection to some of the requests and then sit back until such objections are passed on. He now will have to answer the remaining requests within the allotted time. No longer will he be permitted to deny in *toto* a particular request be-

cause he knows a part of it can be denied, although he is aware that another part is true. He will now have to specify so much of the request as is true, and deny only the rest.

Admissions are admissible and binding only in the particular action. They cannot be used against the admitter for any other purpose or in any other place.

Under the amended rule, objections to requests must be filed within the time specified for answering them, or such objections will be waived.

Many lawyers mistakenly think that requests for admissions may go only to the genuineness of documents or of facts stated *in those documents.* This is erroneous. They may relate to any relevant facts whatever. The amended rule makes this clear, although the courts had already so held. *Smyth v. Kaufman,* 2 Cir., 114 F. (2d) 40.

Let me repeat that the trial court is given ample power under rule 30(b) to protect adverse parties against harassment and unfairness of any kind in the matter of depositions, and that this protection is extended by the amendments to interrogatories and demands for production and inspection.

Conclusion

Every case should be eyed with a view to summary judgment. Analysis may, of course, show that it is impossible to eliminate all controversial issues, but in any event, by thorough use of the discovery procedure and the motion for summary judgment, you probably can dispose of a great part of your case before trial.

(Note: in *Schreffler v. Bowles,* 10 Cir., 153 F. (2d) 1, *Avrick v. Rockmont Envelope Co.,* 10 Cir., 155 F. (2d) 568, and *Doehler Metal Co. v. United States,* 2 Cir., 149 F. (2d) 130, note 6, will be found cited the principal cases on summary judgment.)

Certified Shorthand Reporters

By C. P. GEHMAN*

In 1929 there was added to the statutes of Colorado an act the avowed purpose of which was to "encourage proficiency in the practice of shorthand reporting as a profession; to promote efficiency in court reporting and to extend to the courts and to the public generally the protection afforded by a standardized profession, by establishing a standard of competency for those engaged in it."

The act had the merit that the moderate amount collected as examination fees bore all the expenses in connection with it. As a matter of fact the members of the board of examiners generally go into their own pockets for

*Of the Denver bar; court reporter.

small incidental expenses rather than undertake to get anything back from the more ample but even tighter pockets of the state.

The state board of shorthand reporters consists of three members "skilled in the art and practice of shorthand reporting." They hold office for three years, the term of one member expiring each year. The members of the board receive no compensation, except the gratification sometimes of seeing applicants show excellent qualification for certificates. But this gratification is badly damaged on occasion by the necessity of telling ambitious applicants that they fail to come within the requirements.

There is a reciprocity clause for certification of persons in Colorado similarly certified in other jurisdictions.

Section 19 of the act provides:

"From and after January 1, 1931, no person shall be appointed to the position of shorthand reporter in any of the courts of record of this state or on any state commission requiring the services of a shorthand reporter for any hearing or trial, unless such person be the holder of a certificate from the state board of shorthand reporting, created under and by virtue of sections 1 to 18 of this chapter."

This section does not apply to county courts in counties of the third, fourth or fifth class. It will be noted that the use of certified shorthand reporters is mandatory as to the other bodies.

What is the effect of this law? That it is a desirable law is attested by the enactment of similar laws in many of the states. There are a number of benefits, direct and indirect.

It encourages to a certain extent stability of employment by giving encouragement to those of proved ability. But perhaps the mere fact that it is on the statute books brings the greatest benefit. Why is that so? It is notice to those desiring to obtain employment with the bodies mentioned in the act that certain standards of competency are required. This has caused a very considerable dusting off of the technical books of the profession. Much more effort is made to acquiring the knowledge and skill needed for official appointments. Grammars, dictionaries, wordbooks and phrase lists have been brought forth from their hiding places.

Thus the courts, and the public generally, are the more efficiently served; and after all that should be the chief aim of most human endeavor.

Applicants for certification ask many questions, answers to which they think may be helpful. For instance, there is that delicate problem of "when should the reporter undertake to correct a speaker's diction?" Here is a situation illustrating the point. A learned member of the legal profession used the expression that "the right of action is *predicated* upon" so-and-so. He used the expression not only once but a number of times. But Webster's New International Dictionary, second edition, says the use of *predicate* in

any such sense has no warrant in good usage. To correct or not to correct, that is the question.

It has been the uniform policy of the members of the board of shorthand reporters to give every proper encouragement to persons seeking certification. In a community not larger than ours it is generally not difficult to learn of the general reputation and standing of applicants. That would be more difficult in the larger centers of population.

Examinations are held, generally in one of the divisions of the district court in the City and County Building in Denver, on the last Saturday of June and November of each year.

It is a rather strange fact that shorthand reporting, and even less strenuous types of shorthand work, very commonly creates a real sort of stage fright. This often creates embarrassment, especially, of course, to younger people. To write shorthand in any sort of a test is trying to most temperaments. The boards have uniformly considered this fact, and examinations have been conducted in a spirit of friendliness and helpfulness, not forgetting the necessities of the situation.

Of the applicants for certification perhaps about half are able to show themselves qualified. Two pairs of applicants in Colorado showing excellent qualifications have been, perhaps, unusual. One of these pairs was a man and his wife; the other pair was two sisters.

Personals

ROBERT T. KINGSLEY, assistant district attorney of Denver since 1941, has resigned to enter private practice with Ammons and Bromley. Mr. Kingsley graduated from Denver University law school in 1936, and is a veteran of World War II.

JOHN C. VIVIAN, former governor of Colorado, has opened offices for the practice of law at 326-7 First National Bank Bldg., Denver.

HAROLD B. NEWROCK, assistant city attorney of Denver for the past year and a half has resigned to enter private practice with Means and Isbill in the Midland Savings Bldg., Denver. Mr. Newrock formerly practiced in Louisville, Lafayette and Erie, and is a veteran of World War II.

STANLEY W. PRISNER, formerly with Bannister, Bannister and Weller, has now opened his own offices for private practice at 407 University Bldg., Denver.

ERSKINE R. MYER has withdrawn from the firm of Brock, Akolt, Campbell & Myer and has opened his own office at 301 Equitable Bldg., Denver. John R. Coen, Fred E. Neef and Donald C. McKinlay have moved their offices to the same suite. Brock, Akolt & Campbell will continue practice under that name at 1300 Telephone Bldg., Denver.